1963

La Mar Peay v. Board of Education of Provo City School District et al : Petition for Rehearing and Brief

Utah Supreme Court

In the Supreme Court of the State of Utah

LA MAR PEAY,

Plaintiff and Appellant,

vs.

BOARD OF EDUCATION OF PROVO CITY SCHOOL DISTRICT, a body corporate and politic, and MERRILL CHRISTOPHERSON, RAY MURDOCK, SHIRLEY PAXMAN, WILFORD E. SMITH, and LA MAR EMPEY, Members of said Board,

Defendants and Respondents.

CASE NO. 9722

Petition for Rehearing and Brief on Petition for Rehearing

Appeal from Judgment of the Fourth District Court of Utah County
HON. R. L. TUCKETT, Judge

Allen B. Sorensen of
YOUNG, YOUNG & SORENSEN
227 North University Avenue
Provo, Utah
Attorneys for Respondents

NIELSEN, CONDER & HANSEN
510 Newhouse Building
Salt Lake City, Utah

MORGAN & PAYNE
128 East Center Street
Provo, Utah
Attorneys for Appellant.

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

AUTHORITIES

CASES

TABLE OF CONTENTS (Continued)

In the Supreme Court of the State of Utah

LA MAR PEAY,

Plaintiff and Appellant,

vs.

BOARD OF EDUCATION OF PROVO CITY SCHOOL DISTRICT, a body corporate and politic, and MERRILL CHRISTOPHERSON, RAY MURDOCK, SHIRLEY PAXMAN, WILFORD E. SMITH, and LA MAR EMPEY, Members of said Board,

Defendants and Respondents.

CASE NO. 9722

Respondents' Petition for Rehearing and Brief on Petition for Rehearing

PETITION FOR REHEARING

Defendants and respondents respectfully petition this court for its order granting rehearing in the above entitled case.

This petition is based upon the following points, whereby it asserts the court has erred, hereinafter argued in the brief annexed hereto and made part of this petition:

Point I: In arriving at its decision, this court apparently gave no consideration to the rule of statutory constuction that contemporaneous and official executive interpretation is entitled to weight in judicial interpretation of a statute.

Point II: It would appear the construction placed upon section 11, Chapter 104, L. U. '61, limiting the vote to those electors who have paid a property tax in the preceding year is a strained construction.

Point III: If persons voting in the election called pursuant to section 11, Chapter 104, L. U. '61, should have been restricted to qualified electors who have paid a property tax, then the court should have required a showing that sufficient invalid votes were cast to change the election results.

Point IV: The proposition voted upon was not ambiguous, but was tied directly to the statutory authority, incorporating the statute itself therein.

Point V: It would appear there is no basis for the awarding of costs against defendants and respondents.

ALLEN B. SORENSEN
Attorney for Defendants and
Respondents

BRIEF ON PETITION FOR REHEARING

Except to the extent attention is drawn thereto in the argument, we believe the facts require no further restatement. We proceed, therefore, to the argument on the points asserted as error.

POINT I

IN ARRIVING AT ITS DECISION, THIS COURT APPARENTLY GAVE NO CONSIDERATION TO THE RULE OF STATUTORY CONSTRUCTION THAT CONTEMPORANEOUS AND OFFICIAL EXECUTIVE INTERPRETATION IS ENTITLED TO WEIGHT IN JUDICIAL INTERPRETATION OF A STATUTE.

Section 53-7-12, U. C. A. '53, referred to by Section 11, Chapter 104, L. U. '61, for the procedure in which the leeway election should be called, was enacted originally as part of Section 2 (75-12-12), Chapter 80, L. U. 1947. It has remained unchanged since its initial enactment.

In his opinion No. 369, dated November 23, 1949, addressed to the Superintendent of Public Instruction, the Attorney General construed this statute as permitting all qualified electors to vote at an election called thereunder, **Biennial Report, Attorney General of Utah,** Biennium ended June 30, 1950. That opinion states in part:

> "While this section provides that in submitting such a question to the electors 'the Board of Education shall . . . follow the procedure in elections for the issuance of bonds so far as applicable,' I have not been able to find any provision setting forth any special qualification for voters participating in an election held pursuant to Section 75-12-12 [53-7-12, U C A. '53]. I am of the opinion, therefore, that any qualified voter in the school district where such an election is being held is privileged to cast his or her vote regardless of whether or not he or she may have paid a property tax."

The Legislature has met in general session six times

since this interpretation was given by the Attorney General. It has seen fit to make major changes in practically each such session in school financing legislation, but it has left the questioned statute unchanged. Presumably many Boards of Education have availed themselves of this statute, and presumably they have relied upon the intepretation thus given in calling such elections.

We are not unmindful that courts are not necessarily bound by executive or administrative interpretation of statutes. However, this court has given weight to such interpretation when such interpretation has been of long standing and rights and duties have accrued thereunder. **State v. Alta Club,** 120 Utah 121, 232 P. 2d 759, **State v. Hatch,** 9 Utah 2d 288, 342 P. 2d 1103, **in re Cowan's Estate,** 98 Utah 393, 99 P. 2d 605, **Southwestern Exploration Co. v. County of Orange,** 283 P. 2d 257, 44 Cal. 2d 549, **Mountain View Union High School v. City Council,** 335 P. 2d. 957, 168 C. A. 2d 89. See also 2 Sutherland, **Statutory Construction,** (3d Ed), Sec.'s 5101 and following:

In its opinion this court states, in discussing the question of legislative intent:

> "In this connection it is legitimate to take cognizance of **legislative policy** as demonstrated in the closely analogous situations involving the incurring of indebtedness by school districts dealt with in Chapter 10 of Title 53. . . ." (Emphasis added).

We respectfully assert that this statement does not accurately represent the facts. First, the respective situations are not necessarily closely analogous. The incurring of indebtedness fixes fiscal obligations for future years without regard to subsequent changes in administration or needs.

The "leeway" proposition is merely permissive, allowing Boards of Education greater resources, from year to year, depending on Board policy, in operating revenue available. More important, the property tax qualification for voting on incurring of indebtedness is NOT a matter of legislative policy; it is a matter of constitutional mandate, set forth in Article XIV, Section 3, Utah Constitution. No such constitutional mandate exists as regards special taxes. Article I, Section 4, and Article IV, Section 7, Utah Constitution. See also **Official Report of the Proceedings and Debates of the Convention to Adopt a Constitution for the State of Utah**, pages 231-233, 778-783, and 1142.

We respectfully state that no legislative policy is discernable in Utah on such questions. Section 26-14-10, U. C. A. '53 provides that the board of trustees of a Mosquito Abatement District may call an election to submit the question of additional tax levy, submitting the proposition "to the electors of the district," without regard to property qualifications. Petitions to annex additional area must be signed by owners of more than half the assessed valuation of the proposed annexation, but upon such petition, the proposition is submitted "to the electors of the district" without regard to property qualification. 26-14-12, U. C. A. '53.

Only electors who shall have paid a property tax are qualified to vote on propositions involved in a Cemetery Maintenance District, 8-1-5 U. C. A. '53. No vote at all is provided as a condition of creating a Water Conservancy District. Chapter 9, Title 73, U. C. A. '53. Both may fix tax levies.

The creation of a Metropolitan Water District is by

vote of all electors residing within the proposed district, without regard to property qualifications. 73-8-8 U. C. A. '53. Yet Metropolitan Water Districts have the levy fixing power.

The statute authorizing Fire Protection Districts, which may fix tax levies, states ". . . Qualified electors, under the general laws of the state, living within such district shall be entitled to vote on the question of whether the distict shall or shall not be created." 17-9-5 U. C. A. '53.

Our search has not been exhaustive. The foregoing is submitted merely to illustrate the absence of any fixed legislative policy which may be used as a basis for interpreting section 53-7-12, U. C. A. '53.

POINT II

IT WOULD APPEAR THE CONSTRUCTION PLACED UPON SECTION 11, CHAPTER 104, L. U. '61, LIMITING THE VOTE TO THOSE ELECTORS WHO HAVE PAID A PROPERTY TAX IN THE PRECEDING YEAR IS A STRAINED CONSTRUCTION.

That section is permissive, allowing a board of education to raise additional operating revenue for the school system, should it choose, "with the consent of a majority of the electors of the district," NOT "with the consent of a majority of the electors of the district **who shall have paid property tax in such district in the year next preceding such election."**

The remainder of that section dealing with the obtaining of such consent is concerned with **procedure,** not with the substantive qualification of electors. The statute merely says such election shall be "held . . . in the man-

ner set forth in Section 53-2(7)-12, Utah Code Annotated 1953." That is, the mechanics of the call, setting up, and conducting the election is as therein provided.

That section, in turn, states that "the board of education shall give such reasonable notice of such submission as it may deem proper, and shall follow the **procedure** in elections for the issuance of bonds **so far as applicable.**" (Emphasis added). Here again, the legislature is talking of the mechanics of the election, not substantive qualification of electors.

The opinion of the Court, relying upon section 53-10-11, U. C. A. '53, dealing with **qualifications** of voters on an election to create indebtedness, states that the interpretation urged would render part of that section inoperative. We submit that such is precisely the function of the phrase "so far as applicable" in section 53-7-12 U. C. A. '53. The construction placed by the court renders the phrase 'so far as applicable' entirely meaningless. We respectfully urge that the court has, in construing the several statutes, confused first, the question of qualification of electors and the mechanics of conducting the election, and second, the matter of an election for a special tax, wherein the legislature may or may not require a property qualification of the elector, and the matter of an election for the purpose of incurring indebtedness, wherein the legislature has no prerogative.

In all instances we have found where we believe the legislature intended to impose the property qualification on electors, it has expressly so stated. Here the court has read the limitation into the act by implication. We believe the law should be that no construction of an election law

should be indulged in which would disfranchise any voter, if the law is reasonably susceptible to any other meaning. **Patterson v. Justus,** 173 Kan. 207, 245 P. 2d 968. Indeed, this court went far along the trail of this rule in **Rothfels v. Southworth,** 11 Utah 2d 169, 356 P. 2d 612, when it permitted those whom many might consider transients to help choose state and local officers who in turn exercise powers of the sovereign far greater than that of fixing a limited mill levy. We respectfully but firmly assert that the decision of this case reverses that direction with a vengeance.

POINT III

IF PERSONS VOTING IN THE ELECTION CALLED PURSUANT TO SECTION 11, CHAPTER 104, L. U. '61, SHOULD HAVE BEEN RESTRICTED TO QUALIFIED ELECTORS WHO HAD PAID PROPERTY TAX, THEN THE COURT SHOULD HAVE REQUIRED A SHOWING THAT SUFFICIENT INVALID VOTES WERE CAST TO CHANGE THE ELECTION RESULT.

The pleadings show that this is an election contest. The complaint expressly so states. The answer denied specifically that unqualified voters cast ballots or, in the alternative, that if any did, they were not sufficient in number to alter the results. As far as we know, or as far as the record shows, no elector who had not paid a property tax in the district in the year preceding the election cast a ballot in the election here contested.

The decision of this court merely states that the act "requires property taxpayer qualification for voting at the election provided therein." Perhaps this requirement was

met. Certainly the burden of showing otherwise rests upon plaintiff.

Section 20-15-1 U.C.A. '53, as far as applicable, states:

> "The election . . . to determine any proposition submitted to a vote of the people, may be contested:
> . . .
> (4) When illegal votes have been received, or legal votes have been rejected, at the polls **sufficient to change the result.**
> . . . ." (Emphasis added)

This point was argued before the trial judge, but, in view of his construction of the statute, this was considered immaterial. We urged this position on argument before this court. We do not believe the decision answers this question, or, if it does, it reverses a position previously taken.

Whitmore v. Carbon County, 36 Utah 394, 104 Pac. 222, concerned a writ of prohibition to restrain the issuance of bonds pursuant to an election. The resolution stating "that the question of the issuance of such bonds be submitted to the qualified electors of said Carbon County at a special election which is hereby called for that purpose." The notice of election did not specify limitation on electors voting, though it stated that the election was called and would be held "as provided by law."
This court, in denying the writ, stated:

> "It is alleged in the answer to the petition for the writ, and it is admitted by the petitioner, that only such qualified voters as had paid a property tax in the county in the year 1908 were permitted to vote, and only such voted at the election.

> . . . It is now contended by the petitioner that the election is void because the notices did not specify the particular qualifications which entitled the electors to vote. And it is especially contended that the notices were insufficient because they did not contain the statement or specification, in substance or effect, that none but qualified voters who had paid a property tax in the county in the year 1908, or in the year next preceding the election, were entitled to vote. The statute itself prescribes the qualifications of such electors. It was not essential to set them forth in the notice. (Cases cited) The function and purpose of the notice is not to notify the public and taxpayers what the law is, but to notify them of the proposed action to be taken, and of the time and place when and where the consent of those entitled by law to give or hold it may be obtained. We do not see any merit to the contention."

The same position was again taken by this court in **Van Orden v. Board of Education,** 56 Utah 430, 191 Pac. 230.

We again draw the court's attention that respondents have never admitted in the case at bar that non-taxpaying electors voted in the contested election. We have, in the alternative, pleaded that if such be the case, insufficient such votes were cast to alter the results. We assert that on the authority of this court, and should it adhere to its position that the statutes here involved restrict voters at "leeway" elections to those who have paid a property tax, the appellant still must show that sufficient votes were cast by unqualified electors to change the results.

Not only is this point naturally of concern to defendants and respondents, but it should be imperative that other boards of education have a clear answer.

If the absence from the notice calling such election of the statement that only electors who have paid a property tax in the district in the preceding year may vote voids the election, and if that alone voids it, then boards of education throughout the state should be made aware thereof, as should boards of county commissioners, who actually fix the levy annually. The authority granted by "leeway" elections is a continuing one, several boards of education have called such elections in years passed, and assert authority under the results thereof which they may well not have under such an interpretation.

If the interpretation is in fact otherwise, then we are at a loss to understand how the election in question is voided on this point. **Olson v. Fleming,** 254 P. 2d 335, 174 Kan. 177. See also **Sacramento County v. Stephens,** 53 P2d 197, 11 Cal. App 2d 110.

POINT IV

THE PROPOSITION VOTED UPON WAS NOT AMBIGUOUS, BUT WAS TIED DIRECTLY TO THE STATUTORY AUTHORITY, INCORPORATING THE STATUTE ITSELF THEREIN.

In holding our position on the qualification of electors untenable, the decision of this court states that we would thereby give effect to a part of the statute and ignore others. We respectfully but strenuously urge that in holding the proposition placed upon the ballot void for ambiguity, this court does exactly the same thing. It would appear to completely ignore the phrase "as provided in Section 11, Chapter 104, Laws of Utah 1961," and the further phrase "as provided by law."

The only legislative authority by way of leeway elections is that contained in the last sentence of the first paragraph of section 11:

> "Said voted leeway program shall not exceed an amount equal to 20% of the **basic program of the district.**" (Emphasis addd)

The "State-supported minimum program' or "minimum **school** program" as defined in sub-section (a) of Section 3, Chapter 104, Laws of Utah 1961, is defined as including many matters not the concern of the local districts. The proposition upon which the electors voted does NOT use the phrases "state supported minimum program" or "minimum school program." It poses the question whether the board may "maintain a 'voted leeway' program **as provided in Section 11, Laws of Utah 1961,** not to exceed ten per cent (10%) of the minimum basic program **provided by law.**" (Emphasis added).

Admittedly, the use of the word 'minimum' was unfortunate, but we fail to see wherein that word would mislead a vote. It should be understood that we deem the entire legislative arrangement for school financing unduly intricate, complex and far from a model of legal draftsmanship. We challenge anyone to draft a proposition for a 'leeway' election that is simple and lucid. We submit that the simplest form to submit the proposition is by express reference to the statute itself, and this is what was done.

An analogous problem was presented to the supreme court of Kansas in the case of **Gray v. Joint Rural High School District,** 286 P. 2d 147, 178 Kan. 387. This was a consolidated action to enjoin two boards of education from

issuing bonds to construct a joint high school, pursuant to an election held in the two districts. Most issues therein discussed are not material here. The court refused the injunction.

One of the grounds urged for the injunction was that the proposition placed on the ballot was ambiguous and uncertain. The proposition thus stated on the ballot was whether the district could issue its bonds "not to exceed" a given figure. In each instance the figure stated in the proposition, if bonds were issued therefore, would cause that district to exceed its statutory debt limitation.

The court stated:

> "It is to be noted further that the proposals were to vote bonds in an amount **not to exceed** (sic) a stated amount. Any contention that the exact amount of bonds to be issued was not stated and therefore the elections were illegal cannot be sustained. At the time of the elections there was nothing to indicate the full amount would not be issued and sold. In Pittsburg Board of Education vs. Davis 120 Kan. 768, 245 P. 112, it was held that the fact that the statutes prohibited the issuance of bonds in excess of the amount named does not prohibit voting for more than that amount. In that opinion cases in support are reviewed. In an analogous case this court, considering a proposition submitted wherein bonds 'not exceeding' a stated sum were voted upon, held that 'this slight departure from the precision of statement required by the statute,' did not render the proposed issue illegal." (Cases cited)

The court further states:

> "There was nothing misleading for the reasons the electors knew at all times they could not exceed the statutory seven per cent limitation, and they were ad-

vised by the question submitted that the total cost stated was not a finality, but only an estimated cost."

The court of course pointed out that the districts could not issue bonds exceeding the seven per cent debt limitation, but that question was not before the court.

To the assertion that the proposition on the ballot was void and ambiguous because of the language used, the court states:

> "We have not overlooked the criticism of appellants that the statute, 72-507, states that the cooperating school boards shall determine and agree upon the total estimated cost of the joint building 'and the amount to be born by each of the uniting districts,' while the concluding part of the question submitted states the bonds of District 9 shall not be issued unless District 30 shall authorize $122,000 of bonds to pay its share of the cost (sic). Appellants seem to contend the voters were misled because of the use of the word 'share" instead of the word 'amount'. Assuming the word 'share' should not have been substituted, we do not think anyone was confused in the slightest because it was."

Elsewhere, in discussing the fact that the amount of the bonds authorized exceeded the debt limit, and the effect thereof on the fact that each district's election was tied to the other, the court states:

> "Nor do we think the voters had any cause to believe that regardless of the amount of bonds District 9 might issue, District 30 had no choice but to issue bonds in the amount of $122,000. They must be presumed to know that the electors of that district were under the same statutory authority and restrictions as

> they were, **and this appears in the question submitted where those statutes are specifically mentioned.** In our opinion, the proposition and question submitted were substantially in accord with the statute and the voters were not misled."

In the case at bar, the respondents sought authority from the electors, not to incur a specific debt for a specific capital improvement, but to maintain operations at a continuing higher level than they could otherwise. What better way is there to define the authority sought than to refer specifically to the statute under which the authority is sought? The Kansas court sees this as sufficient. Nor did it find that the voters were misled because the proposition submitted used the word 'share' instead of 'amount'.

Nor do we believe it can be asserted or inferred that the electors in the election here contested were misled. What was sought was one half the maximum authority obtainable under the provisions of Section 11, Chapter 104, Laws of Utah 1961. The proposition states exactly that, with the further proviso, "as provided by law". Certainly no one asserts that the Board would or possibly could acquire more authority than that through a leeway election.

The cases of **Whitmore v. Carbon County,** 36 Utah 394, 104 Pac. 222, and **Van Orden v. Board of Education,** 56 Utah 430, 191 Pac. 230, cited elsewhere herein on the question of qualifications of electors, present an analogy we believe valid. We paraphrase by stating that the function and purpose of the proposition is not to notify the public and the taxpayers what the law is, but to notify them of the proposed action to be taken.

POINT V

IT WOULD APPEAR THAT THERE IS NO BASIS FOR THE AWARDING OF COSTS AGAINST DEFENDANTS AND RESPONDENTS.

This action was brought against the Board of Education of Provo City School District and the members of the board, as such members. We take respondents to be an agency of the State of Utah.

Rule 54 (d) (1) U. R. C. P. provides:

> ". . . . Costs against the State of Utah, its officers and agencies shall be imposed only to the extent permitted by law."

We believe this to have always been the law. We find no statute upon which the award herein made is based. **Tracy v. Peterson,** 1 Utah 2d 213, 265 P. 2d 393.

The only statute we find which by the greatest stretch of imagination could be held to authorize award of costs is Chapter 15 of Title 20, U. C. A. '53. We state that this does not apply, as provisions therein go only to the question of election contests as between candidates. Moreover, though the pleadings are framed as an election contest, this court apparently does not so consider the case.

If we are in error in this conclusion, then section 20-15-1, U. C. A. 53, quoted under Point III herein, would apply, and this court should have remanded the case for a determination whether illegal votes cast would change the result.

CONCLUSION

We are informed that some nine Boards of Education, administering school districts with a total school population representing a substantial majority of that in the State, are operating under authority granted by "leeway" elections. We are further informed that in none of the elections were property qualifications required, at least in the notices calling such elections. Apparently their counsel read the statutes as we do. The Attorney General so read the statutes, as did the trial court. This court is the first official body to give the construction in the decision.

The proposition voted upon in Provo City School District was debated long and loud in the community, in public meetings and in the press. Counsel for appellant participated therein. No question as to the interpretation of the statute or meaning of the proposition as phrased in the notice calling the election was raised by anyone. Debate was on the merits of the proposed authority sought by the board. No one claimed to be misled. A substantial majority of voters indicated a desire for an enlarged school program. There is no showing that unqualified electors voted, regardless of the qualification imposed. It does not lie now with appellant to question action of the electorate. We believe the court should reverse the electorate only on most compelling grounds. The grounds stated in the opinion are, we submit, not compelling.

Another matter of grave concern arises, in view of the provisions of sections 59-11-11 U. C. A. '53, and 59-10-14, U. C. A. '53, and the cases decided by this court thereunder. Although the applicability of these sections to the problem at hand cannot be determined in this case, the possibilities

in a later case on facts of which we may not now be aware, could be catastrophic to school districts not presently before the court. The decision herein, we suggest, might open a plethora of litigation.

We respectfully request that the petition for rehearing be granted, and that upon hearing thereon, this court affirm the trial court.

Respectfully submitted,

ALLEN B. SORENSEN
Attorney for Respondents